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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5388

OTIS LOPER,

Petitioner,

v.

GEORGE J. BETO, Director,
Texas Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The memorandum opinion and judgment of the United States District Court for the Southern District of Texas, Houston Division, is not reported and may be found in the Appendix ("App.") at pages 59-65. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 440 F.2d 934 (1971) (App. 67-83).

JURISDICTION

Jurisdiction of this Court to review the judgment in question is based upon Section 1254 (1) of the Judicial Code.

The judgment of the United States Court of Appeals for the Fifth Circuit is dated and was entered March 24, 1971 (App. 84). A timely petition for rehearing and petition for rehearing pro se were denied by orders of the Court of Appeals entered April 26, 1971 (App. 85-86).

A petition for writ of certiorari was filed on June 21, 1971 and was granted October 12, 1971, limited to consideration of the question hereinafter stated (App. 87).

QUESTION PRESENTED

Does the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case?

STATEMENT OF THE CASE

Loper was arrested on August 9, 1947 and indicted on the charge of statutory rape of his eight-year-old step-daughter. At Loper's trial on November 17, 1947 in the District Court of Harris County, Texas, only two witnesses testified on the issue of the commission of the crime by Loper, one for the prosecution and one for the defense. The state relied solely upon the testimony of the eight-year-old victim of the rape to identify Loper as the violator (App. 24-25). The only testimony used by the defense was that of the petitioner himself. Taking the stand in his own defense, Loper testified that he had not committed the crime (App. 42, 46, 49-50).

During cross-examination by the state, Loper's testimony was impeached by the state through the use of four prior felony convictions obtained in the States of Mississippi and Tennessee. Over defense counsel's objections on grounds of

remoteness in time and prejudicial effect upon the jury (App. 47-48), the State elicited from Loper the details of prior convictions for burglary occurring in 1940 in Carthage, Mississippi, for which Loper was sentenced to five years imprisonment; in 1935 in Petros, Tennessee, resulting in a four year sentence; and in 1931 in Parchman, Mississippi, for which Loper, then seventeen years of age, was sentenced to six months imprisonment (App. 47-48). The state also brought forth that Loper had been tried and convicted of burglary in Mississippi in 1932 under the name Milton Cummings, and had been sentenced to two years imprisonment for that offense (App. 48-49). Loper was found guilty of the offense by the jury and on November 20, 1947, was sentenced to 50 years in the state penitentiary.

At the trial of his petition for writ of habeas corpus in the United States District Court, Loper testified regarding the circumstances surrounding the prior convictions. In essence he testified that he was not represented by counsel, did not know and was not advised of his right to counsel, and did not inform the court that he did not desire counsel (App. 15-16). Loper also introduced court records to corroborate his testimony. A certified copy of the sentence from the 1940 conviction recites appearance at the trial by the prosecutor and by "the defendant in his own proper person" (Pl. Ex. 8, App. 52). Certified copies of the indictment and judgment in the 1935 conviction also recite appearance by the prosecutor "and the defendant in person" (Pl. Ex. 9, App. 55). Certified copies of the indictment, judgment and sentence introduced regarding the 1931 conviction are silent regarding the presence or absence of counsel (Pl. Ex. 10, App. 56-58). No evidence has been introduced by the State which could rebut or contradict the testimony of Loper or the matters relfected upon the face of these records.

The United States District Court for the Southern District of Texas in an unreported Memorandum Opinion and Decision denied Loper's claim that introduction of the prior convictions at the 1947 trial resulted in a denial of his constitutional right to a fair and impartial trial (App. 59 at pp.

62-63). The United States Court of Appeals for the Fifth Circuit affirmed (App. 67 at p. 69-71), holding that the circumstances involved did not bring Loper within the scope of the Court's decision in *Burgett v. State of Texas*, 389 U.S. 109 (1967).

On September 1, 1971, Loper was granted parole by the members of the Texas Board of Pardons and Paroles, and is presently at liberty in the legal custody of the Texas Department of Corrections. Upon motion and by order of the Court entered November 16, 1971, the members of the parole board were joined in this cause as parties respondent.

SUMMARY OF ARGUMENT

The evidence introduced with respect to the prior felony convictions used for impeachment at Loper's 1947 state court trial raised a presumption that Loper had been denied the right to counsel and that the convictions were therefore void under *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Burgett v. State of Texas*, 389 U.S. 109 (1967), involved an attempted use of prior void convictions for enhancement of punishment upon conviction of the primary offense. The attempt failed, however, and the trial court instructed the jury not to consider the prior convictions for any purpose. In reversing the resulting conviction, this Court firmly established the constitutional principle that prior uncounseled convictions may not be used "either to support guilt or enhance punishment . . . for another offense," since such use would result in the defendant suffering anew from the earlier deprivation of the right to counsel secured to him by the Sixth Amendment to the Constitution.

The rationale of this Court's decision in *Burgett* encompasses introduction by the State of prior void convictions for the purpose of impeaching Loper who took the stand at his 1947 trial to testify in his own defense. Evidence which is introduced to impeach testimonial credibility has the obvious purpose of causing the trier of fact to believe such testimony is unreliable because of character of the

witness. Where such impeachment evidence is used against a defendant taking the stand to testify in his own behalf, the necessary effect of such impeachment evidence is "to support guilt" by discrediting the defendant's testimony to the contrary, and is therefore prohibited under the doctrine established in *Burgett* where the impeachment evidence so used is tainted by the constitutional infirmity inhering in the uncounseled convictions.

The constitutional safeguards of *Burgett* have been retroactively applied by the federal courts in conformity with the precepts for such determination established by this Court. Although the effect of such evidence was referred to in *Burgett* as "inherently prejudicial," courts have considered and applied the harmless error doctrine where challenges to prior convictions have been raised in reliance upon that case. Here the substance and nature of the testimony presented at Loper's state court trial rendered critical the issue of credibility of the witnesses and the weight to be given to their testimony. The issue of guilt resolved itself into one of whether the jury would believe the testimony of the eight-year-old child or that of Loper. That the jury did not credit Loper's testimony is obvious from the resulting conviction, and it is not only "reasonably possible" but probable that the invalid impeachment evidence was a factor leading to their determination of guilt. Under such circumstances, the unfairness and prejudicial effect inherent in the State's use of prior void convictions to impeach Loper's credibility could not be considered harmless error.

ARGUMENT

The principle of *Burgett v. State of Texas*, 389 U.S. 109 (1967), is that to permit a conviction obtained without the assistance or valid waiver of counsel and therefore void under *Gideon v. Wainwright*, 372 U.S. 335 (1963), to be used against a person either to support guilt or enhance punishment for another offense is to cause such person to

suffer anew a violation of the right to counsel guaranteed by the Sixth Amendment of the Constitution and made applicable to the states by the Fourteenth Amendment. The issue here squarely presented is whether the rationale of this Court's decision in *Burgett* is applicable to the use of prior void convictions for impeachment purposes in circumstances where such use may have influenced the jury verdict.

In *Burgett*, the indictment of the defendant, in addition to allegations upon the primary substantive count, contained counts under the Texas Recidivist statute reciting three prior Tennessee convictions and one prior Texas conviction. During the course of the trial and in the presence of the jury, the trial court allowed evidence to be introduced in support of one of the Tennessee convictions contained in the recidivist counts. The state thereafter failed by proper proof to establish the recidivist counts, and the case went to the jury only upon issues concerning the primary substantive violation. Upon the failure of proof, the trial court specifically instructed the jury not to consider the prior convictions for any purpose. The defendant was convicted upon the primary offense and was sentenced to 10 years imprisonment. The Texas Court of Criminal Appeals affirmed on the basis that there had been no enhanced punishment and no error in introducing the priors because of the trial court's instruction to the jury. On appeal of the resulting conviction, this Court held that the certified records introduced rendered the prior Tennessee conviction presumptively void. In considering the further question of whether presentation of such evidence to the jury under the above circumstances required reversal of the conviction, even though the defendant's sentence had not been enhanced as a result of the recidivist count, this Court held:

> "To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense (see Greer v. Beto, 384 U.S. 269,

> 16 L. ed. 2d 526, 86 S. Ct. 1447) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at page 115.

The Fifth Circuit Court of Appeals in facing the similar question—void convictions used for the purpose of impeachment—refused to apply the principles of *Burgett* holding in effect that use of prior, void convictions for impeachment, rather than enhancement, is not proscribed by *Burgett* or that even if it is, such use in Loper's case was "harmless beyond a reasonable doubt" under *Chapman v. California*, 386 U.S. 18 (1967). After commenting upon Loper's "heavy reliance" upon the rationale of *Burgett*, the Court of Appeals states:

> "By analogy [Loper] argues that the same rule should apply to the use of such former convictions for the purpose of impeachment. We decline to extend the teachings of Burgett to the situation here presented. * * * Except for the assertions of Loper the record fails to furnish any conclusive information as to the facts and circumstances surrounding his former convictions. * * * Furthermore, it is obvious to us that the use of such convictions as evidence for purposes of impeachment which goes only to credibility, is not nearly so serious as the use of a conviction for enhancement, which may add years of imprisonment to the sentence of a defendant." 440 F.2d at page 937 (App. 70).

In refusing relief because the record failed to furnish any "conclusive information" as to the facts and circumstances surrounding the former convictions, the Court of Appeals has disregarded evidence introduced by Loper which is almost precisely the same as that considered in *Burgett*. In addition to the testimony of Loper that he did not have and made no valid waiver of his right to counsel, corroborative evidence was introduced consisting of certified records

of the prior convictions in 1940 and 1935, respectively, which recited appearance by "the defendant in his own proper person" and by "the defendant in person." The certified records of the prior conviction in 1931 is silent as to the presence or absence of counsel. The State brought forth no countervailing evidence with respect to the proceedings at the prior convictions, and the evidence thus introduced stands uncontradicted in the record. The evidence presented is the same as that considered in *Burgett* where certified records of the prior Tennessee conviction admitted by the trial court stated that the petitioner had appeared "in proper person." The determination of this Court with respect to the effect of such evidence of prior convictions is clear:

> "In this case the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void. Presuming waiver of counsel from a silent record is impermissible. Carnley v. Cochran, 369 U.S. 506, 8 L. ed. 2d 70, 82 S. Ct. 884." 389 U.S. at page 114-15.

The evidence introduced by Loper rendered the prior convictions presumptively void, and shifted the burden to the state to produce evidence that such proceedings, under the mandate of *Gideon* retroactively applied, were not fundamentally unfair. *Losieau v. Sigler,* 406 F.2d 795 (8 Cir., 1969) cert. denied, 396 U.S. 988 (1969); *Williams v. Coiner,* 392 F.2d 210 (4 Cir. 1968). See also United States ex rel. *Esterling v. Wilkins,* 303 F.2d 883 (2 Cir., 1962). Since the State did not produce any evidence upon this issue, the prior convictions used to impeach Loper are presumptively void.

The basic issue here presented is whether *Burgett* prohibits use of prior invalid convictions for impeachment purposes. The Court of Appeals for the Fifth Circuit declined to adopt this interpretation, basing its decision in part upon the ground that use of such convictions to

impeach credibility "is not nearly so serious" as their use to enhance punishment which may add years of imprisonment to the resulting sentence. 440 F.2d at page 937. In so doing the Court of Appeals has placed unwarranted focus upon the possible result, in terms of length of imprisonment if conviction is obtained, as opposed to the possible effect upon the constitutional rights of the defendant and the fairness of the trial by use of such evidence to obtain a conviction. No valid basis for drawing such a distinction can be perceived from an analysis of the constitutional precept involved. Manifestly, whether the prior void convictions are introduced to enhance or impeach and regardless of the term of sentence involved, the result has been that the defendant has suffered anew from proceedings infected by the unconstitutional deprivation of counsel. The conclusion by the Fifth Circuit in this regard is contrary to that of other Courts of Appeals which have interpreted the proscription of *Burgett* to include not only prior void convictions used for enhancement but those used to impeach credibility as well. See *Gilday v. Scafati*, 428 F.2d 1027 (1 Cir., 1970), cert. denied, 400 U.S. 926 (1970); *Tucker v. United States*, 431 F.2d 1292 (9 Cir., 1970), cert. granted, 402 U.S. 942 (May 3, 1971).

The circumstances involved and opinion of the Court leave little doubt that *Burgett*, although it involved facts which brought before the jury prior void convictions in the context of enhancement, includes within the scope of its proscription the use of prior void convictions for the purpose of impeaching credibility as well. *Burgett* was decided upon the same constitutional principles underlying this Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Overruling *Betts v. Brady*, 316 U.S. 455 (1942), the Court in *Gideon* held that the right to counsel guaranteed by the Sixth Amendment was applicable to the states by virtue of the Fourteenth Amendment and that it was a violation of rights secured by the Federal Constitution to try a person in state court absent legal representation or a valid waiver thereof. The decision has been given retro-

active application. *Burgett v. Texas*, supra, 389 U.S. at 114; *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963). Implicit in *Gideon* is that denial of counsel in a criminal trial necessarily invalidates the conviction because lack of counsel so jeopardizes the fairness of the trial that any finding of guilt is likely to be unreliable. *Linkletter v. Walker*, 381 U.S. 618, 639 (1965); *Stovall v. Denno*, 388 U.S. 293, 297-98 (1967). Accordingly, where the defendant has suffered a violation of his constitutionally guaranteed right to counsel, *Burgett* mandates that the defendant must not thereafter be made to suffer anew from such violation. Because of the unreliability of uncounseled convictions, their use in any subsequent criminal proceeding simply compounds the original denial of the right to counsel secured by the Constitution. *Gilday v. Scafati*, supra, 428 F.2d at page 1029; *Spaulding v. State*, 481 P.2d 389, 392 (Alaska Sup. Ct., 1971). The defect in the proceedings which resulted in the uncounseled conviction presents an infirmity that infects use of such conviction thereafter for any purpose. *People v. Coffey*, 60 Cal. Rptr. 457, 430 P.2d 15, 25 (1967).

The Court in *Burgett* did not limit its holding and opinion to the context of enhanced punishment, but took a broader view in holding that the use of prior convictions, void under *Gideon*, against the defendant "either *to support guilt* or enhance punishment *for another offense*" is to erode the principle of that case. 389 U.S. at page 115 (emphasis added). In fact, the decision in *Burgett* is itself inconsistent with the limitation of its constitutional principles to enhancement situations. There, although the prior void convictions were initially admitted in support of the recidivist count, they were later withdrawn and the jury instructed not to consider them for any purpose. They no longer had any enhancement potential and, notwithstanding the trial court's instruction to disregard them for all purposes, this Court held that they so tainted the trial as to render the resulting conviction constitutionally infirm. That infirmity is even more apparent in Loper's case, for the

prior void convictions were admitted over objection for the purpose of causing the jury to disbelieve Loper and thus convict him. Their effect "to support guilt" was certainly stronger than that condemned by the Court in *Burgett*.

Other considerations compel that the constitutional principles embodied in *Burgett* apply with equal force where use of the void convictions is for impeachment purposes. The purpose of impeachment by prior convictions is to cast doubt upon the truthfulness of the impeached witness. The prosecutor utilizes such evidence of prior convictions with the expectation that the jury will discredit the testimony of the impeached witness as unreliable because of the witness's prior criminal conduct. The credibility of an accused testifying in his own behalf is material to his guilt or innocence. *Gilday v. Scafati*, 428 F.2d 1027, 1029 (9 Cir., 1970); *Johnson v. State*, 9 Md. App. 166, 263 A.2d 232, 239 (1970). The prejudicial effect of such impeaching evidence has been heretofore "conceded" by this Court. *Spencer v. Texas*, 385 U.S. 554, 561 (1967).[1] Thus, use of prior convictions to impeach Loper's credibility was "to support guilt" of the offense for which he was on trial. Since the impeaching evidence was unreliable because of the constitutional infirmity inhering in the underlying uncounseled convictions, the same unreliability exists in any

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[1]The situation is accurately characterized in McCormick, Evidence §43, p. 93 (1954). "The sharpest and most prejudicial impact of the practice of impeachment by conviction * * * is upon one particular type of witness, namely, the accused in a criminal case who elects to take the stand. If the accused is forced to admit that he has a 'record' of past convictions, particularly if they are for crimes similar to the one on trial, the danger is obvious that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to its legitimate bearing on credibility."

conclusion of untruthfulness which might have been drawn by the jury therefrom. *Gilday v. Scafati*, supra, 428 F.2d at page 1029. The record reflects no admonition or limiting instruction by the court to the jury, as in *Burgett*, not to consider the prior convictions for any purpose, or even the customary instruction not to consider such prior convictions for the purpose of determining guilt or innocence upon the offense alleged in the indictment. *Spencer v. Texas*, supra, 385 U.S. at page 558. Most important, in the absence of enhanced punishment, admission of the prior convictions had no effect other than that the jury's awareness of such prior void conviction might have affected its decision upon the substantive charge, which is precisely the situation if such prior void convictions had been used in *Burgett* solely for the purpose of impeachment. See *Tucker v. Craven*, 421 F.2d 139 (9 Cir., 1970) cert. denied, 398 U.S. 929 (1970) (introduction of invalid priors in enhancement context taints conviction on primary offense); compare *Arsenault v. Massachusetts*, 393 U.S. 5 (1969) (impeachment by guilty plea entered at preliminary hearing when accused not represented by counsel required reversal of resulting conviction). This is not foreclosed by this Court's decision in *Spencer*, supra, since that decision did not involve consideration of constitutionally infirm prior convictions. The prejudicial effect of having evidence of prior convictions before the jury at the guilt determination stage of trial there acknowledged and allowed because of the valid state interest involved and limited procedural safeguards afforded cannot be justified where the prior convictions utilized for impeachment were obtained in violation of Loper's "specific federal right" to assistance of counsel.

The decision of the Fifth Circuit Court of Appeals in this case is in direct conflict with the conclusions regarding applicability of *Burgett* reached by the United States Courts of Appeals for the First and Ninth Circuits in *Gilday v. Scafati*, 428 F.2d 1027 (1970), cert. denied, 400 U.S. 926 (1970), and *Tucker v. United States*, 431 F.2d 1292 (1970), cert. granted, 402 U.S. 942 (May 3, 1971). In *Gilday*, Peti-

tioner was tried and convicted of armed robbery in March 1964 and sentenced to a term of imprisonment of 15 to 25 years. During the trial, the petitioner took the stand to testify in his own behalf and the prosecutor was allowed upon cross examination to offer evidence of five prior convictions to impeach petitioner's credibility. Three of the convictions were the result of trials where petitioner neither had nor validly waived the assistance of counsel. With respect to the scope of *Burgett* and its inclusion of prior convictions used for impeachment, the Court of Appeals held:

> "'We conclude that the Burgett rule against use of uncounseled convictions 'to prove guilt' was intended to prohibit their use 'to impeach credibility,' for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt. Moreover, such use compounds the original denial of the constitutional right just as surely as does use 'to prove guilt or enhance punishment.' Finally, defendant's privilege to testify or not to testify—Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)—is seriously impaired if the price of testifying is the potential admission of invalid and possibly unreliable convictions which could not otherwise be admitted. We therefore hold that Burgett prevents the use of uncounseled convictions for purposes of impeachment." 428 F.2d at page 1029.

The Court of Appeals went on to conclude, however, that under the facts presented by the record, the reception of evidence pertaining to the invalid convictions was harmless error. Upon substantially the same facts, the same result and conclusion was reached by the Ninth Circuit in *Tucker*

v. United States, supra.[2] That *Burgett* includes within its scope prior void convictions used for impeachment has also been determined by state courts which have considered the issue. *Johnson v. State*, 9 Md. App. 166, 263 A.2d 232 (1970); *Spaulding v. State*, 481 P.2d 389 (Alaska Sup. Ct. 1971); *In re Dabney*, 76 Cal. Rptr. 636, 452 P.2d 924 (1969). Compare *Simmons v. State*, 456 S.W.2d 56 (Tex. Crim. App., 1970). See also *Subilosky v. Commonwealth*, 265 N.E.2d 80 (Mass. Sup. Jud. Ct., 1970); *People v. Coffey*, 60 Cal. Rptr. 457, 430 P.2d 15 (1967).

The constitutional safeguards established in *Burgett* have been applied retroactively by the courts in *Gilday* and *Tucker*, and by other federal courts, *Tucker v. Craven*, 421 F.2d 139 (9 Cir., 1970), cert. denied, 398 U.S. 929 (1970); *Losieau v. Sigler*, 406 F.2d 795 (8 Cir., 1969), cert. denied, 396 U.S. 988 (1969); *Oswald v. Crouse*, 420 F.2d 373 (10 Cir., 1969); *Williams v. Coiner*, 392 F.2d 210 (4 Cir., 1968), in conformity with the principles for retroactive application established by the Court. *Desist v. United States*, 394 U.S. 244, 249 (1969); *Roberts v. Russell*, 392 U.S. 293 (1969); see also *Bates v. Nelson*, 393 U.S. 16 (1968); *Arsenault v. Massachusetts*, 393 U.S. 5 (1969). Review has also included, however, consideration of whether the introduction of such evidence at the trial was "harmless error" under the doctrine established by this Court in *Chapman v. California*, 386 U.S. 18 (1967). The Fifth Circuit Court of Appeals in this case

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[2]In *Tucker*, the prior void convictions were introduced not only to impeach credibility but additionally to assist the court in fixing sentence. Tucker had received the maximum sentence of 25 years for the offense involved. The Ninth Circuit concluded that there was a "reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence," 431 F.2d at page 1294, and remanded the cause for resentencing without consideration of the invalid priors. Certiorari to review this decision has been granted, 402 U.S. 942 (1971).

sought to support its determination by reference to *Chapman*, concluding in effect that the error, if any, in admitting the prior void convictions was harmless. The Court of Appeals failed, however, to treat the evidence of record or otherwise set forth any basis upon which it might have reached this conclusion. In *Burgett*, the Court referred to *Chapman*, noting that the admission of a prior criminal conviction which is constitutionally infirm is "inherently prejudicial." Although this accords with its further holding that instructions by the court to the jury not to consider the prior conviction for any purpose did not cure the error, it is not clear whether the Court meant to establish a "per se" violation by this reference, and the language has been construed as not having that effect. See *Gilday v. Scafati*, supra, 428 F.2d at page 1030. The criticisms which have been leveled at existing practices of impeachment by concededly admissible evidence of prior convictions lends much support to application of a per se rule where the evidence used is tainted. See authorities collected in 3A Wigmore, Evidence § 390, n. 1 (Chadbourne rev. 1970). Even if it is assumed that the harmless error doctrine of *Chapman* applies, the standard set forth can have no application under the facts presented by the record before this Court. In *Chapman*, the Court articulated the standard as follows:

> "We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. Connecticut, 375 U.S. 85, 11 L. Ed. 2d 171, 84 S. Ct. 229. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' * * * We, therefore, do no more than adhere to the meaning of our Fahy Case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at pp. 23-24.

Thus, if there is a "reasonable possibility" that the constitutional error was one which influenced the jury adversely to the litigant, it cannot be harmless. The effect which

introduction of the invalid priors in Loper's 1947 trial had can be measured by reference to the transcript of those proceedings set forth at length in the Appendix (App. pp. 19-51). The transcript is not one reflecting evidence "so overwhelming" that Loper committed the offense that the violation of *Burgett* was harmless error. *Harrington v. State*, 395 U.S. 250 (1969). The issue of whether the offense was committed and by whom was sharply disputed. The only evidence introduced to establish Loper as the violator was that of the eight-year-old victim. Compare *Ballard v. Howard*, 403 F.2d 653 (6 Cir., 1968). Taking the stand in his own defense, Loper's testimony denying complicity was impeached upon cross examination by the state by introduction into evidence of the prior void convictions. The details as to nature of the offense involved, date and term of imprisonment were carefully elicited (App. 47-49), and reference was again made by the State to the four prior felony convictions upon subsequent examination (App. 50). The issue of guilt was reduced to consideration by the jury of whose testimony was to be credited—that of the young girl who identified Loper as the violator or that of Loper claiming innocence of the charge. It is manifest that the jury resolved the issue of credibility adversely to Loper in convicting him of the offense. One of Loper's court-appointed attorneys at the 1947 trial, L. D. Harris, testified at the hearing in the district court that he believed at the time that the prosecution's case was constructed on "very flimsy evidence" (App. 18). Under these circumstances, a case constructed solely on such uncorroborated testimony and impeachment of the testimonial credibility of Loper, the prejudicial error in admission to the jury of the constitutionally infirm prior convictions could not possibly be "harmless beyond a reasonable doubt."

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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